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APR 29 1998

Federal Communications Commission
Office of Secretary

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April 29, 1998

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re FCC ~~Docket~~ No. 97-296 and MM Docket No. 97-182

Dear Sir or Madam:

Enclosed please find the Reply Comments of the Massachusetts Attorney General in the above-referenced dockets.

Sincerely,

Edward G. Bohlen

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Assistant Attorney General

Enclosed
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APR 29 1998

**Before the
Federal Communications Commission
Washington, D.C. 20554**

**Federal Communications Commission
Office of Secretary**

In the Matter of

Preemption of State and Local Zoning and
Land use Restrictions on the Siting,
Placement and Construction of Broadcast
Station Transmission Facilities

FCC No.
97-296
MM Docket No.
97-182

Re

Comments Invited on Environmental Impact of
Possible Preemption of Local Land Use and Zoning
Laws Regarding the Siting and Construction of Digital
Television Towers

DA 98-458

To: The Commission

REPLY COMMENTS OF THE MASSACHUSETTS ATTORNEY GENERAL

**SCOTT HARSHBARGER
ATTORNEY GENERAL**

**Edward G. Bohlen
Assistant Attorney General**

**Office of the Attorney General
Environmental Protection Division
200 Portland Street
Boston, Massachusetts 02114**

April 29, 1998

I. Introduction

The Attorney General of the Commonwealth of Massachusetts ("Massachusetts Attorney General"), on behalf of the Commonwealth of Massachusetts and all of its agencies and boards, files these reply comments regarding the Federal Communication Commission's March 6, 1998, Public Notice. The Commission seeks comment on the issues raised in the *Petition for Preparation of an Environmental Impact Statement* filed by the National Audubon Society on December 1, 1997 ("Audubon Petition") in connection with the Commission's *Notice of Proposed Rule Making in the Matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities* (FCC No. 97-296, MM Docket No. 97-182) ("NPRM").

The NPRM requested comment on whether and in what circumstances the Commission should preempt certain state and local zoning and land use restrictions in conjunction with the siting, placement and construction of broadcast station transmission facilities. The Rule was presented to the Commission jointly by the National Association of Broadcasters and the Association For Maximum Service Television, Inc., ("the broadcast industry") in a *Petition for Further Notice of Proposed Rule Making*. The broadcast industry contends that certain state and local zoning and land use ordinances present an obstacle to the rapid implementation of digital television service. The Massachusetts Attorney General has previously participated in this proceeding by filing comments on October 29, 1997, opposing the broadcast industry's proposed rule as overbroad in its preemptive sweep and in excess of the agency's statutory authority.¹

The Audubon Petition alleges that the proposed Rule constitutes a major federal action affecting the environment requiring the preparation of an Environmental Impact Statement

¹ The proposed rule would "deem granted" within 21 to 45 days any request for any state or local authorization needed to construct or modify broadcast transmission towers and facilities (AM, FM, and TV), regardless of compliance or non-compliance with the substantive requirements of state and local law. The Massachusetts Attorney General agrees with the comments of the Vermont Attorney General and the Concerned Communities that the proposed rule would effectively preempt state and local laws governing the siting, placement, and construction of hundreds of broadcast towers.

("EIS") pursuant to the National Environmental Protection Act ("NEPA"), 42 U.S.C. §4321, *et seq.* Audubon urges the FCC to reject the proposed Rule, or, in the alternative, prepare an EIS and solicit public comment on the EIS before making a decision on the Rule.

The Massachusetts Attorney General strongly supports the Audubon Petition and the comments in support of that petition filed by the National Audubon Society, the Vermont Office of the Attorney General and the Concerned Communities.² The Massachusetts Attorney General strongly opposes the comments filed by the broadcast industry. As explained below, an EIS is required because the proposed Rule, when evaluated under the criteria outlined in NEPA and the Council for Environmental Quality ("CEQ") regulations, would have a significant effect on the quality of the human environment.

II. Approving the Proposed Rule Would Be A Major Federal Action With Significant Environmental Effects; NEPA Requires An EIS.

NEPA requires the preparation of an EIS for every "Major federal action significantly affecting the quality of the human environment." 42 U.S.C. §4332, *et seq.* Regulations of the Council on Environmental Quality ("CEQ") define "major federal action" as including "actions with effects that *may be* major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18 (emphasis added). "... CEQ regulations implementing NEPA are binding on all federal agencies." *Sierra Club v. Sigler*, 695 F.2d 957, 964, 972 (5th Cir. 1983).

There is no question that approving the proposed rule would be a major federal action under NEPA and CEQ regulations. Approving a rule that would preempt hundreds or even thousands of state and local laws and ordinances relating to broadcast tower siting

² The Concerned Communities include Denver, Colorado, Detroit and Wyoming, Michigan, Arlington, Cedar Hill, Denton, Lancaster and Longview, Texas, and Chesapeake, Virginia.

unquestionably "may" have major effects that certainly would then potentially be "subject to Federal control and responsibility." The proposed rule thus meets the criteria of a major federal action defined by the CEQ regulations. 40 C.F.R. § 1508.18.

There is also no question that approving the proposed rule would "significantly" affect the quality of the human environment under the criteria set forth in CEQ regulations. 40 C.F.R. §1508.27. As indicated by the Concerned Communities and other parties, broadcast towers are huge, can be seen for many miles, and are often located in environmentally-sensitive areas such as wetlands and mountain-tops. Such towers can have significant impacts on plants, animals, soils and aesthetics. The National Audubon Society commented that "between 2 million and 4 million migratory birds are killed each year as a result of collisions with TV and radio towers."

State and local review proceedings are important in protecting the environment from harmful siting proposals. Massachusetts has, for example, state and/or local zoning and wetlands permit requirements designed to ensure that development does not violate certain standards or unduly harm the environment. Such permit proceedings provide a forum for the consideration of alternatives and measures to mitigate environmental impacts. If state and local consideration of environmental, land use, health and safety concerns can occur only within a window of 45 days or less, the appropriate airing of local concerns will not occur, and the human environment and other public interests will suffer significantly.

For all of these reasons, an EIS is required under NEPA and CEQ regulations for such a major federal action that would have such significant effects on the quality of the human environment.

The broadcast industry argues in its comments that an EIS is not required. It states that the Commission has already made the determination of how its jurisdiction over broadcast towers intersects with the requirements of NEPA and has implemented rules to that effect. The industry suggests that the environmental impacts of broadcast towers are already adequately

covered by Commission rules. For example, the industry cites 47 C.F.R. §1.1307(a), requiring the filing of an Environmental Assessment for broadcast facilities that would be located in certain areas. As another example, the industry cites 47 C.F.R. §1.1311(a)(2), requiring that the Environmental Assessment must include a “statement as to the zoning classification of the site, and communications with, or proceedings before and determinations (if any) made by zoning, planning, environmental or other local, state, or federal authorities on matters relating to environmental effect.”

Other sections of the same rule, that were not mentioned by the industry, require the filing of: 1) a “statement as to whether construction of the facilities has been a source of controversy on environmental grounds within the local community;” and 2) “evidence of site approval which has been obtained from local or federal land use authorities.” 47 C.F.R. §1.1311(a)(3) and (c). CEQ Regulations evince the same concern with avoiding conflicts with local authorities on environmental issues. See, e.g., 40 C.F.R. §§1502.16(c), 1501.7, 1503.1(a)(2)(i), 1506.2(d), and 1506.6(b)(3)(i).

The fact that the Commission’s current rules require information about local proceedings and authorizations highlights the deficiency of the proposed rule and the reason that an EIS is required before a decision is reached on any rule proposing such major changes. Local and state authorities have traditionally been primarily responsible for land use, environmental, and health and safety decisions rather than federal agencies. This makes sense because local and state authorities are in a better position to know and evaluate the local needs and environmental concerns and protect the public interest. The Commission’s current rule, more than the proposed rule, appropriately defers to state and local land use and environmental authority.

III. Conclusion

The proposed rule would interfere with the ability of local authorities to decide local needs and environmental concerns relating to broadcast towers. Before a decision is reached on

the proposed rule, an EIS is required under NEPA and CEQ regulations.

Respectfully submitted,

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